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IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Honorable Harold Hood Presiding

TERESA COX, as *Next Friend of* **BRANDON COX**, a Minor, **TERESA COX** and **CAREY COX**, Individually,

Plaintiff-Appellees,

-vs-

BOARD OF HOSPITAL MANAGERS FOR THE CITY OF FLINT d/b/a **HURLEY MEDICAL CENTER**, a municipal Corporation,

Defendant-Appellant.

_____/

Supreme Court Docket No. 118110
Court of Appeals Docket No. 205025
Genesee C.C.C. No. 92-122247-NM

AMICUS CURIAE BRIEF OF THE MICHIGAN HEALTH AND HOSPITAL ASSOCIATION

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INTEREST OF AMICUS CURIAE

The Michigan Health and Hospital Association, or the MHA, is tax-exempt corporation. The MHA's members include substantially all acute care hospitals in this State. The MHA is a trade organization organized and operated to promote and protect the interests of its members, including the common interests of patient safety, patient care, and the efficient and cost-effective operation of hospitals for the benefit of all Michigan residents.

In October 27, 2000, the Michigan Court of Appeals issued its decision in Cox v Board of Hospital Managers for the City of Flint, 243 Mich App 72 (2001). Two of the issues raised in the Court of Appeals' opinion are of great importance to the members of the MHA.

First, in Cox, the Court of Appeals adopted a rule that authorizes trial courts to deviate from the standard jury instructions in a way that permits the jury to impose liability on a hospital even if the plaintiff has failed to make the necessary evidentiary showing of a breach of a specific duty and standard of care, and of causation. By approving the trial court's instruction, the Court of Appeals endorses the notion that liability for medical malpractice can be based on the conduct of a hospital "unit," such as a neonatal intensive care unit, rather than on the conduct of a specific identified health care provider. This rule deviates from the well-established authorities governing a plaintiff's burden of proof in a medical malpractice case and will have a significant effect on medical malpractice jurisprudence in this State.

Second, the Court of Appeals approved the trial court's decision to apply a national standard of care to a general practitioner – a nurse – based on the say-so of Plaintiff's experts. This ruling also defies the established statutory and case authorities. Under Michigan law, general practitioners such as residents, interns, and nurses are held to the standard of care of the local community or a similar community. Only specialists are held to a national standard of care.

The question of whether a national standard or a local community standard applies is a legal one for the court – not a factual one for an expert.

Both of these issues will have a profound impact on the jurisprudence of this State and will also affect risk management decisions made by hospitals across Michigan.

STATEMENT OF JURISDICTION

The Michigan Health and Hospital Association adopts the statement of jurisdiction of the Defendant-Appellant Hurley Medical Center.

STATEMENT OF QUESTIONS INVOLVED

The Michigan Health and Hospital Association adopts Questions Involved I and II as stated by Defendant-Appellant Hurley Medical Center in its Brief on Appeal.

STANDARD OF REVIEW

The Michigan Health and Hospital Association adopts the standard of review stated by Defendant-Appellant Hurley Medical Center.

I. INTRODUCTION

In Cox, the Michigan Court of Appeals adopted a rule that defies established authorities governing a plaintiff's burden of proof in a medical malpractice case and will have a significant effect on the malpractice jurisprudence in this State. See Cox v Board of Hospital Managers for the City of Flint, 243 Mich App 72 (2001).

The Cox court approved a jury instruction that deviates significantly from SJI2d 30.01 and allows a jury to impose liability on a hospital unit or group without requiring the plaintiff to first establish that a health care provider violated the applicable standard of care. This jury instruction substantially lessens a plaintiff's burden of proof and permits liability to be maintained against a hospital without the necessity of proof that an individual health care practitioner committed malpractice. The Cox court's approval of this instruction flies in the face of well-settled case law requiring a plaintiff in a medical malpractice action to demonstrate (a) the standard of care that applies to the specific alleged tortfeasor, (b) a duty from an individual health care provider to a patient, (c) the breach of that duty, and (d) causation.

After Hurley Medical Center's Application was filed, the Court of Appeals published its decision in Tobin v Providence Hospital, in which the appellate court granted the defendant a new trial when the trial court gave a jury instruction that was nearly identical to the Cox instruction. The Tobin court concluded that a new trial was necessary because the jury instruction given misstated plaintiff's burden of proof and effectively allowed a jury to hold a hospital strictly liable for any injury to one of its patients. There is now a direct conflict in the Court of Appeals.

The Cox decision also improperly authorizes a plaintiff to hold a general practitioner to a national standard of care, despite the fact that all prior statutory and case authorities have held that such a ruling is erroneous as a matter of law. Before Cox, it was black letter law in

Michigan that general practitioners – such as residents, interns, and nurses – were held to a local community standard of care and that a national standard was reserved for medical specialists only. After Cox, that is no longer the case. Based on the say-so of Plaintiff's expert, the Cox court rejected the local community standard and ruled that nurses at the Hurley Medical Center would be held to a general national standard of care. In so ruling, the Michigan Court of Appeals has transformed an issue that poses a question of law – what is the applicable standard of care – into an issue of fact that is subject to expert testimony. This transformation allows an out-of-state expert witness who is totally unfamiliar with the standard of care of the local community to circumvent MCL § 600.2912aa and testify that a general practitioner has committed professional negligence based on nothing more than the expert's own assertion that a national – not local – standard applies.

The unprecedented rulings made in Cox will have a profound impact on the jurisprudence of this State and will disrupt substantially risk management decisions in hospitals across Michigan. Plaintiffs will be relieved of their prima facie evidentiary obligation to establish that a specific health care provider breached a duty and the applicable standard of care. Juries will be asked to determine a hospital's liability for medical malpractice without being instructed as to the specific standard of care that applies to each allegedly negligent health care practitioner. As a result, hospitals will be faced with the prospect of widespread liability based on the actions of hospital "units" or "groups" that is independent of any proof that an individual hospital agent or employee has breached a legal duty. Moreover, if Cox remains the law, general practitioners will be threatened with liability for medical malpractice based upon a national standard of care that may deviate substantially from the standard of their local communities.

The resolution of the legal issues now presented to this Court is essential to maintaining the integrity of medical malpractice law in this State. If the Cox decision is not reversed, it will inevitably lead to significant confusion at the trial court level as judges and litigants struggle to reconcile the contradiction between it and the well-settled law of this State that articulates a plaintiff's burden in a medical malpractice case and the standard of care that applies to a general practitioner. The Michigan Health and Hospital Association asks that this Court vacate the opinion issued by the Court of Appeals, correct the appellate court's legal errors, and remand for a new trial.

II. STATEMENT OF FACTS

The Michigan Health and Hospital Association adopts the statement of facts of Defendant-Appellant Hurley Medical Center.

III. ARGUMENT

A. The Court of Appeals Erred In Approving The Cox Jury Instruction, Allowing The Jury To Hold Hurley's "Neonatal Intensive Care Unit" Liable For Malpractice.

1. The Cox Instruction Misstates Plaintiff's Evidentiary Burden And Allows Liability To Be Imposed On A Hospital Without Proof Of An Individual Breach Of The Standard Of Care.

The Michigan Court of Appeals' opinion, validating the concept that a hospital unit – as opposed to an individual employee or agent – can commit malpractice, contravenes the very nature of a medical malpractice claim. It is fundamental that a hospital can only render treatment through its physicians and nurses. Danner v Holy Cross Hospital, 189 Mich App 397, 398-399 (1991) (quoted by dissent in Cox, 243 Mich App at 98-99). Therefore, liability can only be

established if a plaintiff demonstrates that a specific health care practitioner had a duty, breached the applicable standard of care, and caused an injury to the plaintiff.

This black letter law is incorporated into the Michigan Standard Jury Instructions, which direct a trial court to instruct a jury that it can only impose liability in a medical malpractice case if the plaintiff presents evidence that a specific health care professional of ordinary learning, judgment or skill in the community (or in a similar community) acted in a way that a health care professional of ordinary learning, judgment or skill would not act under the same or similar circumstances. See SJI2d 30.01.

Yet, the Court of Appeals improperly modified SJI2d 30.01 to allow the jury to impose liability on Hurley Medical Center without requiring the plaintiff to identify either the specific *health care practitioner alleged to have committed malpractice* or *the specific standard of care* by which that individual's conduct will be assessed. It approved the trial court's decision to identify the Hurley Medical Center "neonatal intensive care unit" as the alleged tortfeasor, rather than a specific health care provider as required by SJI2d 30.01. Thus, the jury was not instructed that it needed to base its liability decision on the conduct of a specific health care provider. The jury was not instructed on the various – and divergent – standards of care that govern the conduct of different health care providers within a neonatal intensive care unit. This trial court's instruction substantially deviated from SJI2d 30.01, fundamentally misstated the Plaintiff's burden of proof, and inevitably deprived the jury of the ability to fairly evaluate the evidence presented against the individual practitioners in Hurley Medical Center's neonatal intensive care unit.

The Cox opinion will have a widespread impact on future medical malpractice litigation. It authorizes trial courts to deviate from the plain terms of SJI2d 30.01 and to instruct the jury in a way that allows a plaintiff to impose liability against a hospital group or unit, or against a

collection of unidentified employees and agents, without the necessity of proof of individual negligence. A claim of medical malpractice can only arise out of a relationship between individuals – the health care provider, on the one hand, and the patient, on the other. The Cox opinion alters this fundamental tenet of medical malpractice law by expressly authorizing the imposition of liability against a hospital without evidence of the existence of a specific physician-patient duty, a breach of the applicable standard of care, or causation. In other words, a plaintiff who alleges negligence against a hospital "unit" rather than an individual is relieved of presenting sufficient expert testimony to establish a *prima facie* case of individual liability. Such a rule has never before been the law in this State.

2. There Is Now A Direct Conflict In The Court Of Appeals.

The appellate court's gross misstatement of the circumstances under which a defendant hospital can be held liable for malpractice is in direct conflict with another published decision of the Michigan Court of Appeals. In April of 2001, the Court of Appeals released for publication its decision in Tobin v Providence Hospital and created a direct conflict between the Tobin and Cox decisions. See Tobin, 244 Mich App 626 (2001).

In Tobin, the Court of Appeals granted a new trial when the trial court gave the same type of generalized jury instruction that was approved in the Cox decision. Id. at 671-672. The Tobin defendant – like Hurley Medical Center in the Cox case – requested a jury instruction that identified the individual category of specialist that was alleged to have been negligent and the applicable standard of care. Id. at 672. The trial court rejected the defendant's proposed instruction and instead instructed the jury as follows:

> When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a hospital's **agents/servants/employees** of ordinary learning, judgment or skill in this community or a similar one would do . . . .

Id. (emphasis added).

The Court of Appeals held that this instruction so mischaracterizes the plaintiff's burden of proof in establishing liability against the hospital through the conduct of the diverse hospital agents and employees involved in the case that a new trial was necessary to remedy the error. Id.

> The unmodified standard instruction, under the circumstances of this case, was not specific enough; it permitted the jury to find that, for example, the nurse anesthetist violated the standard of care applicable to a critical care unit physician.
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> . . . . [I]n this case plaintiff chose to bring suit against the hospital and its (unnamed) agents, servants, or employees. **Thus, it was incumbent on the trial court to ensure that the jurors clearly understood how they were to determine whether any of defendant's employees committed professional negligence or malpractice under the particular standard of practice applicable to their specialty. The unmodified standard instruction did not fulfill that function.**

Id. at 673 (emphasis added).

Specifically, the general instruction "failed to differentiate between the various standards of practice that were applicable" to the "various employees who were inferentially the subject of plaintiff's lawsuit." Id. at 674. "As a result, the instruction . . . provided little in the way of guidance for the jurors as they attempted to determine if any of defendant's agents or employees had violated the standard of care applicable to their own particular specialty." Id. at 674-675. A new trial was required because the instruction "omitted material issues, defenses, and theories of defendant." The instruction was "not specific enough to avoid juror confusion and to enhance their ability 'to decide the case intelligently, fairly, and impartially.'" Id. at 675 (quoting Johnson v Corbet, 423 Mich 304, 327 (1985)).

It is not possible to reconcile the Cox and Tobin opinions. The conflict between these two contradictory published decisions will inevitably result in significant confusion at the trial

court level as judges and litigants struggle to determine how the jury should be instructed in a medical malpractice case against a hospital defendant.

This Court should reverse the Court of Appeals and vacate the Cox opinion. This is the only way to eliminate the conflict between the Cox and Tobin decisions and to confirm that liability for medical malpractice can only be imposed upon a hospital for the acts of individual health care practitioners who are found to have violated their applicable standard of care.

B. The Court of Appeals Erred When It Instructed The Jury To Impose Liability On A General Practitioner Based On The Alleged Violation Of A National Standard Of Care.

The Court of Appeals also erred when it applied a national standard of care to a general practitioner – a nurse – based on the testimony of Plaintiff's expert. The Cox court based its ruling on the fact that Plaintiff's "theory was premised on the acts of the NICU that operates as a team in caring for premature babies . . . [and] Plaintiff's experts testified that the team unit is governed by a national standard of care." Cox, 243 Mich App at 82. Both of Plaintiff's experts were admittedly unable to say what the local community standard of care would be for a neonatal nurse practicing at Hurley Medical Center. Id. at 75.

1. As A Matter Of Law, A General Practitioner Is Not Held To A National Standard Of Care.

The Court of Appeals held that, because Plaintiff's expert testified that the neonatal intensive care unit was governed by a national standard of care, and because Defendant did not make a separate offer of proof to show that a local community standard should apply, the trial court did not abuse its discretion in allowing Plaintiff's experts to testify. Id. at 79-83. Notably, the appellate court reviewed the issue under an abuse of discretion standard. Id.

This rule crafted by the Cox majority defies the established statutory and case authorities in Michigan governing the standards of proof that applies to a general practitioner. See Bahr v Harper Grace Hospital, 448 Mich 135 (1995); Whitney v Day, 100 Mich App 707, 710 (1980) (nurse held to local community standard of care); MCL § 600.2912a.

First, the question of whether a national standard or a local community standard applies is a legal one for the court – not a factual one for an expert. See Estate of Bradford v O'Connor Chiropractic Clinic, 243 Mich App 524, 531 (2001) (case law is the starting point to determine standard of care); Jalaba v Borovoy, 206 Mich App 17, 19 (1994) (the court must decide the standard of care in medical malpractice cases). Because it is a question of law, the issue of the appropriate standard of care should be reviewed de novo and not under the deferential abuse of discretion standard applied by the Court of Appeals. See Cox, 243 Mich App at 82 (the appellate court held that, even if the admission of plaintiff's experts' testimony that a national standard of care applied was erroneous, "reversal is not required unless there is prejudicial error").

Second, as a matter of law, general practitioners, such as residents, interns, and nurses, are held to the standard of care of the local community or a similar community. Bahr, 448 Mich at 135; Whitney, 100 Mich App at 707; MCL § 600.2912a(1)(a). Nurses, specifically, are held to a local community standard; in Whitney, the Michigan Court of Appeals approved a jury instruction informing the jury that a nurse anesthetist is held to a local community standard of care. *See 100 Mich App at 710. Only medical specialists are held to a national standard of care.* Bahr, 448 Mich at 135; MCL § 600.2192a(1)(b).

2. The Cox Opinion Exposes General Practitioners To The Prospect Of Widespread Liability Based On A National Standard Of Care.

The rule approved by the Court of Appeals in Cox ignores MCL § 600.2912a, Bahr, and Whitney, and improperly allows an expert who is unfamiliar with the local community standard

to testify that a general practitioner, such as a nurse, has committed professional negligence based on nothing more than the expert's own assertion that a national standard applies.

This Court has described the unique policy concerns that justify imposing a national standard of care on specialists:

> The reliance of the public upon the skills of a specialist and the wealth and sources of his knowledge are not limited to the geographic area in which he practices. Rather his knowledge is a specialty. He specializes so that he may keep abreast. Any other standard for a specialist would negate the fundamental expectations and purpose of a specialty.

Naccarato v Grob, 384 Mich 248, 253-254 (1970) (quoted in Jalaba, 206 Mich App at 22). These same policy considerations do not support assessing a nurse's conduct against a national standard of care – even if that nurse works in a neonatal intensive care unit and is supervised by physicians who are specialists.

The Cox court's acquiescence in the self-serving testimony of Plaintiff's expert that nurses in a neonatal intensive care unit should be held to a national standard of care ignores established Michigan authorities and furthers no public policy interest. If the Cox decision is not swiftly reversed by this Court, general practitioners such as residents, interns, and nurses will be threatened with civil liability for medical malpractice based upon a national standard of care that may very well deviate substantially from the one in their local communities. Small community hospitals and health care centers will be particularly, and unfairly, affected by this rule. The Michigan Health and Hospital Association asks that this Court correct the appellate court's legal error.

IV. CONCLUSION

The Michigan Health and Hospital Association's members are vitally affected by these issues, which are fundamental to medical malpractice law. The Michigan Health and Hospital

Association respectfully requests that this Court reverse the decision of the Court of Appeals, correct the error in the trial court's jury instruction and rulings on standard of care, and remand for a new and fair trial.

Respectfully Submitted,

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